

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON PATRICK SMITH,

Defendant-Appellant.

UNPUBLISHED

December 17, 2013

No. 312508

Wayne Circuit Court

LC No. 11-011776-FH

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of operating while intoxicated (OWI), MCL 257.625(1)(a), operating with a suspended license, MCL 257.904(1)(b), and reckless driving, MCL 257.626. The court sentenced defendant, as a second habitual offender, MCL 769.10, to 18 months to 5 years' imprisonment for the OWI conviction, 90 days for the operating with a suspended license conviction, and 90 days for the reckless driving conviction. For the reasons stated herein, we affirm.

Defendant argues that the OWI conviction violated his due process rights under the United States and Michigan Constitutions. Specifically, defendant contends that the admission of the two breath tests was impermissible because (1) of the lapse in time between defendant's operation of a vehicle and his arrest, and (2) the results of the breath tests were tainted by the consumption of alcohol after driving.

At trial, defendant failed to object to the admission of his breath test results into evidence. This Court reviews unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. Whether a plain error affected substantial rights requires a showing of prejudice; that the error affected the outcome of the proceedings. *Id.* A defendant bears the burden of persuasion with respect to prejudice. *Id.* If a defendant satisfied all three requirements, the appellate court must exercise its discretion in deciding whether to reverse the result of the lower court proceedings. *Id.* Reversal is warranted when the error resulted in the conviction of an actually innocent defendant, or when the plain error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 763-764 (internal quotation marks omitted).

The United States Constitution and the Michigan Constitution guarantee defendants a right to substantive due process. US Const, Am V, XIV; Const 1963, art 1, § 17. Specifically, defendants may not be deprived of life, liberty, or property, without due process of law. Const, Am V, XIV; Const 1963, art 1, § 17. A person is guilty of OWI if that person operates a vehicle upon a highway or other place open to the general public if the person is under the influence of alcohol. *City of Plymouth v Longeway*, 296 Mich App 1, 5; 818 NW2d 419 (2012) (citing MCL 257.625(1)). Michigan law is clear that the amount of alcohol in a person's breath at the time alleged as shown by a breath test is admissible into evidence in a criminal proceeding and is presumed to be the same as at the time the person operated a vehicle. MCL 257.625a(6)(a).

Defendant cites a single, unreported case from the Court of Appeals of Alaska to support the proposition that it is a defense to an OWI charge if one's blood alcohol level can be attributed to drinking after driving. *Wynacht v State of Alaska*, No A-10631, Court of Appeals of Alaska (March 14, 2012). *Wynacht* does allow defendants in Alaska to offer evidence of alcohol consumption after driving as a defense to operating while intoxicated. *Wynacht* unpub op at 2-3. However, that defense is implied from an Alaskan statute; Michigan's statute makes no such implication.

There is no Michigan case to support defendant's position. Further, defendant does not appear to make a constitutional argument, rather he merely disagrees with the jury's finding that he operated a vehicle while intoxicated.

Defendant does assert that the rule of *Wynacht* applies by implication through R. 325.2655(1)(e) and MCL 324.82137. Michigan Administrative Rule 325.2655(1)(e) is the requirement that the administrator of a breath test must observe the subject of the test for 15 minutes prior to the test. The rule does state that the subject should not place anything in his mouth during the 15 minute observation period. R. 325.2655(1)(e). However, the rule does not address any events before the 15 minute observation period, and no Michigan case has ever cited this rule, or implied from it, that if a subject is unaccounted for some time before the observation period, that the test results are invalid. In fact, *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999), directly contradicts defendant's argument. In *Wager*, a breath test was administered approximately 90 minutes after the defendant operated a vehicle. *Id.* at 119-120. The breath test results were nonetheless admitted into evidence over the defendant's objection because, "[t]o the extent that the passage of time reduces the probative value of the test, the diminution goes to weight, not admissibility, and is for the parties to argue before the finder of fact." *Id.* at 126.

Here, defendant's breath test results were .16 and .15. As such, over one hour after defendant drove the vehicle, his blood alcohol level was double or nearly double the legal limit. Therefore, were it true that defendant drank three beers in the hour before police arrived at his home, it is unlikely that three beers would elevate defendant's blood alcohol to the high levels it was measured at in defendant's breath tests. Thus, defendant's claim to have consumed three beers is insufficient to overcome the statutory presumption that defendant's breath test results reflected his blood alcohol content at the time he operated a vehicle. MCL 257.625a(6)(a).

MCL 324.82137, which defendant also cites, merely states that the results of breath tests are admissible into evidence in any criminal proceeding, and that a breath test "shall be taken and collected in a reasonable manner." It appears from the record that the breath tests were

administered to defendant pursuant to the statutory requirements. In sum, there is no rule in Michigan that a blood alcohol test must be suppressed if it is not administered immediately after the defendant operated a vehicle.

Further, as the prosecution points out on appeal, all of the evidence at trial proved beyond a reasonable doubt that defendant was intoxicated at the time he drove, absent the results of the breath test. MCL 257.625(1)(a) prohibits operation of a vehicle while a person “is under the influence of alcoholic liquor.” However, a breath or chemical test is not the exclusive method by which to prove guilt under MCL 257.625(1)(a). In *People v Stephen*, 262 Mich App 213, 219-220; 685 NW2d 309 (2004), an officer had probable cause to arrest, and the defendant was ultimately convicted of, OWI without the use of a breath or chemical test. In *Stephen*, a police officer discovered the defendant asleep in his car, hours after the defendant had actually operated a vehicle while intoxicated. *Id.* at 215. However, the officer’s perception that the defendant smelled of alcohol and had admitted that he drove his car to where he was found were sufficient for the defendant to be convicted of OWI under MCL 257.625(1)(a), without a breath or chemical test being conducted. *Id.* at 219-220. Here, one hour after operating a vehicle, defendant could not stand up or walk, and fell off his front porch when he attempted to speak with officers. Immediately after crashing his car, Sherry Carr observed that defendant was unresponsive and appeared to not understand what Carr was saying. There was no evidence to suggest that defendant drank so much alcohol in the span of one hour that he would be unable to walk and converse with officers.

Defendant has failed to demonstrate any error, much less any error that affected defendant’s substantial rights. Accordingly, the admission of the breath test was not plain error, and there was no violation of defendant’s constitutional due process rights.

Defendant also argues that he was deprived of the effective assistance of counsel, because he failed to object to the admission of defendant’s breath tests. Effective assistance of counsel challenges are mixed questions of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court’s findings of fact are reviewed for clear error. *Id.* “Questions of constitutional law are reviewed . . . de novo.” *Id.* Because defendant did not move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), hearing, this Court’s review is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Criminal defendants have a right under the United States and Michigan Constitutions to the effective assistance of counsel at trial. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (citing US Const, Am VI, XIV; Const 1963, art 1 § 20.) To establish ineffective assistance of counsel, a criminal defendant must show that 1) under prevailing professional norms, counsel’s performance fell below an objective standard of reasonableness; 2) but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different; and 3) the proceedings were fundamentally unfair or unreliable. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Michigan Courts employ a presumption that counsel’s performance is effective, and there is a heavy burden upon a defendant to prove otherwise. *Vaughn*, 491 Mich at 670. Additionally, there is a presumption that counsel’s assistance constitutes sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Defendant's trial counsel did not make an objection to the results of defendant's breath tests, nor did counsel cross-examine the police officer who administered the tests to defendant. However, nothing in Officer Christopher Hayes's testimony suggested that the results of the breath tests were faulty, or that an error had been made before or during the administration of the breath tests. Instead, Officer Hayes laid out for the jury the specific protocol of administering the tests, including a 15-minute observation period before the tests, and that Officer Hayes administered the test twice in order to ensure accuracy. There were no obvious errors in the tests for counsel to examine. Instead, he focused his trial strategy on the lapse in time between defendant's operation of a vehicle and defendant's arrest. Considering this choice of strategy by counsel in light of the presumption of counsel's effectiveness, defendant has not satisfied the heavy burden in proving counsel's performance fell below an objective standard of reasonableness. *Vaughn*, 491 Mich at 670.

And, if counsel's performance fell below an objective standard of reasonableness, the result of the trial would not have been different. Had the results of the breath tests been suppressed, there is overwhelming evidence that defendant operated a vehicle while intoxicated. Carr observed defendant step out of his vehicle unresponsively after hitting several cars for no apparent reason. When officers arrived at defendant's home approximately one hour after defendant operated a vehicle, he could barely stand and fell off his front porch as he attempted to speak with officers. Defendant has not shown that there is a reasonable probability that, but for counsel's error, the result of the trial would have been different. Indeed, the evidence mandates the contrary conclusion.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad